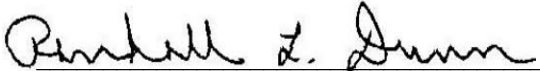


Below is an Opinion of the Court.

  
RANDALL L. DUNN  
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF OREGON

In Re:	)	
	)	Bankruptcy Case
JOHN M. HANLEY,	)	No. 12-38801-rld7
	)	
Debtor.	)	
<hr/>		
SUSAN L. MURRAY,	)	Adversary Proceeding
	)	No 13-03046-rld
Plaintiff,	)	
	)	
v.	)	MEMORANDUM OPINION
	)	
JOHN M. HANLEY,	)	
	)	
Defendant.	)	

This adversary proceeding ("Adversary Proceeding") was tried before me (the "Trial") on October 28, 2013. Under the Pretrial Order (Docket No. 74), plaintiff Susan L. Murray ("Ms. Murray") asserted three exception to discharge claims against defendant John M. Hanley ("Mr. Hanley"): § 523(a)(2)(A) - fraud; § 523(a)(4) - embezzlement; and

1 § 523(a)(6) - willful and malicious injury.<sup>1</sup>

2 During the Trial, I listened carefully to witness testimony and  
3 the arguments of counsel. Following the Trial, I have reviewed my notes  
4 from the Trial, the admitted exhibits, the parties' Trial memoranda, and  
5 the Pretrial Order. I further have taken judicial notice of relevant  
6 entries on the docket and documents filed in the Adversary Proceeding and  
7 in Mr. Hanley's main chapter 7 bankruptcy case for purposes of confirming  
8 and ascertaining facts not reasonably in dispute. Federal Rule of  
9 Evidence 201; In re Butts, 350 B.R. 12, 14 n.1 (Bankr. E.D. Pa. 2006). I  
10 have considered the testimony and arguments presented by the parties. In  
11 addition, I have reviewed relevant legal authorities, both as cited to me  
12 by the parties and as located through my own research.

13 Based on that consideration and review, I have come to a  
14 decision. The findings of fact and conclusions of law stated in this  
15 Memorandum Opinion constitute my findings and conclusions for purposes of  
16 Fed. R. Civ. P. 52(a), applicable in this Adversary Proceeding pursuant  
17 to Fed. R. Bankr. P. 7052.

#### 18 Factual Background

19 This Adversary Proceeding is freighted with the baggage of a  
20 failed personal relationship.

21 Ms. Murray was divorced in 2003 after thirty-three years of  
22 marriage. During the marriage, her former husband handled the finances  
23 for the household/marital community. Ms. Murray operated a bakery from  
24 approximately 1996 to 2007 that was marginally profitable. She received

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25  
26 <sup>1</sup> Unless otherwise indicated, all chapter and section references are  
to the federal Bankruptcy Code, 11 U.S.C. §§ 101-1532.

1 a substantial financial settlement in her divorce that she invested in  
2 certificates of deposit ("CD's") and a savings account at a discount  
3 brokerage firm. Ms. Murray established through her testimony that she is  
4 risk averse and is not a sophisticated investor. See also Exhibit D,  
5 p. 3.

6 Ms. Murray resides in Boise, Idaho. She met Mr. Hanley in 2006  
7 through Match.com. He represented to Ms. Murray that he was financially  
8 secure. At the time that the parties first connected with one another,  
9 Mr. Hanley lived in Tucson, Arizona. In late 2007, after the parties had  
10 developed a relationship, Mr. Hanley moved into Ms. Murray's home in  
11 Boise.

12 Mr. Hanley listed his occupation on his Match.com profile as a  
13 "semi-retired securities trader." In his deposition, Mr. Hanley  
14 characterized his work in the securities field as follows:

15 A[nswer]: Passion, love, love of the game.

16 Q[uestion]: What game?

17 A[nswer]: The stock market game. It's the best game in the  
18 world to me.

19 Q[uestion]: Describe why that is.

20 A[nswer]: It's just fun. When I sit in front of the screen and  
21 at 7:00 in the morning, or whenever it is, I can sit there for five or  
22 six hours and it's like one hour will have passed, and I've done it for  
30 years. It's a passion. . . .

23 Exhibit 35, pp. 109-10. At some point, Mr. Hanley provided Ms. Murray  
24 with advice regarding investing in gold, from which she made some money.

25 In March 2009, the parties purchased a home together in Boise  
26 ("Boise Home"), with Ms. Murray paying 75% of the purchase price and

1 Mr. Hanley paying 25%. Prior to purchasing the Boise Home together, the  
2 parties had a mutual commitment ceremony but never married. However,  
3 Ms. Murray changed her name to "Susan Murray Hanley." In August 2009,  
4 Ms. Murray bought out Mr. Hanley's interest in the Boise Home because  
5 Mr. Hanley did not want to continue to pay one quarter of the expenses  
6 for landscaping and otherwise improving and maintaining the Boise Home.  
7 Mr. Hanley had experienced losses in his securities trading. Thereafter,  
8 Mr. Hanley began to pay rent to Ms. Murray of \$1,000 a month.

9 In April 2011, the parties entered into the \$100,000 loan  
10 transaction (the "\$100,000 Loan") that is the basis for Ms. Murray's  
11 Adversary Proceeding claims. The parties' respective versions of related  
12 events, as to which they each testified, are materially different, and I  
13 set out each party's assertions as to what happened separately, as  
14 follows:

15 A. Ms. Murray's Version

16 Ms. Murray and Mr. Hanley shared an office in the Boise Home.  
17 Ms. Murray testified that in the evening of April 8th, 2011, they were  
18 both working in the Boise Home office, and Mr. Hanley turned to her and  
19 asked, "Can I borrow \$100,000?" She asked him why. According to  
20 Ms. Murray, Mr. Hanley told her that he had \$100,000 in a cash account,  
21 but he had been losing money. He further told her that he had in excess  
22 of \$500,000 in an account that he could not access. He could combine her  
23 \$100,000 with his available cash for a total of \$200,000 that he would  
24 invest very slowly and cautiously, taking "baby steps." Her loan to him  
25 would be "risk free," absolutely safe. He told her to "Trust me."  
26 Relying on Mr. Hanley's representations, Ms. Murray loaned him the

1 \$100,000.

2           The \$100,000 Loan was documented by a promissory note ("Note"),  
3 a copy of which was admitted into evidence as Exhibit 7. The Note was  
4 dated April 8, 2011, with a principal amount of \$100,000, bearing  
5 interest at the rate of 6% per annum. The Note reflects that it was due  
6 and payable in full in a year on April 8, 2012, and it is signed by  
7 Mr. Hanley. Ms. Murray testified that Mr. Hanley filled out the Note  
8 form and that it already was filled out when he asked her to loan him the  
9 money. According to Ms. Murray, Mr. Hanley told her at the time, "Just  
10 read it and sign. I am so sure of myself, I will give you 6% interest."  
11 Mr. Hanley deposited the \$100,000 Loan funds to his TD Ameritrade  
12 account. See Exhibit 9.

13           In June, 2011, Ms. Murray testified that Mr. Hanley told her  
14 that he had lost all of the money that she had loaned to him. She was in  
15 shock, and an argument ensued. The next day, she ended her relationship  
16 with Mr. Hanley and asked him to leave. He was given a month to find a  
17 new place to live, and Ms. Murray understood that Mr. Hanley moved to  
18 Wilsonville, Oregon.

19 B. Mr. Hanley's Version

20           In his testimony, Mr. Hanley denied asking Ms. Murray to loan  
21 him \$100,000. He remembered the conversation with Ms. Murray in the  
22 evening on April 8, 2011, as follows: Ms. Murray bemoaned the fact that  
23 her CD returns were so low. She asked Mr. Hanley how trading was going,  
24 and he responded, "Not well," or "About the same." According to  
25 Mr. Hanley, Ms. Murray initiated the \$100,000 Loan transaction by asking,  
26 if she gave him a loan, would he give her 6% return? He asked, how much

1 are we talking about? She responded, \$100,000. He thought about it and  
2 said okay. Mr. Hanley testified that Ms. Murray asked for a promissory  
3 note, and thereafter he got the Note form from Office Depot and filled it  
4 out. Although Mr. Hanley confirmed that he signed the Note on April 8,  
5 2011, he recalls talking about the \$100,000 Loan transaction with Ms.  
6 Murray days before. He confirmed that Ms. Murray wrote him a \$100,000  
7 check on April 8, 2011, which he deposited at Wells Fargo bank in their  
8 joint checking account, and sent on the Exhibit 9 check to TD Ameritrade  
9 from the Wells Fargo account.

10 Mr. Hanley denied that he told Ms. Murray that he had lost all  
11 of the money in June 2011, but he admitted that he told her he was losing  
12 in his securities trading activities.

13 On direct examination by Ms. Murray's counsel, Mr. Hanley  
14 admitted that at various times in February through April 2011, he had  
15 received notices from TD Ameritrade that he had fallen below the \$25,000  
16 minimum in his TD Ameritrade account "to participate in pattern day  
17 trading." See Exhibits 3-6. When asked at his deposition if he told  
18 Ms. Murray that he was "taking baby steps to make money," Mr. Hanley  
19 responded, "No, I don't use those words." See Exhibit 35, p. 119.  
20 However, in an April 10, 2007 e-mail communication to Ms. Murray,  
21 Mr. Hanley talks about taking a "baby step" in their relationship twice.  
22 See Exhibit 2, p. 2. In his deposition, Mr. Hanley also denied  
23 vehemently that he had told Ms. Murray in April 2011 that he had \$100,000  
24 but needed an additional \$100,000 to make an investment. See Exhibit 35,  
25 p. 97. However, in an e-mail communication to Ms. Murray after the  
26 \$100,000 Loan transaction had gone sour, Mr. Hanley stated: "Can you

1 think of a single reason why I would take your \$100k and add it to my  
2 \$100k and intentionally lose it?" See Exhibit 21, p. 2. See also  
3 Exhibit 26, p. 3. In his testimony at the Trial, Mr. Hanley admitted  
4 that he may have told Ms. Murray that he had \$100,000 and also admitted  
5 that he only had about \$27,000 in liquid funds at that time. His  
6 explanation is that he was thinking about "buying power," and his buying  
7 power for purposes of securities trading, based on \$27,000 of available  
8 cash, would be approximately \$100,000. See also Exhibit 35, p. 86.  
9 However, he further testified in his deposition that, "I don't think  
10 [Ms. Murray] understands day trading buying power or any buying power."  
11 Id., p. 87.

12 C. Testimony of David Murray

13 The only witness other than the parties who testified at the  
14 Trial was Ms. Murray's son, David Murray. He testified, without  
15 objection, as to a conversation that he had with Ms. Murray shortly after  
16 she made the \$100,000 Loan to Mr. Hanley. In that conversation,  
17 Ms. Murray told her son that at the time the \$100,000 Loan transaction  
18 was discussed, Mr. Hanley told her that he had lost money in the market,  
19 that he needed to get back on track, and that her loan of \$100,000 to him  
20 would give him \$200,000 to invest. As he remembered the conversation,  
21 Ms. Murray also told him that Mr. Hanley had told her that he would  
22 invest the \$100,000 Loan money in a safe way, so that the Note would be  
23 paid in a year.

24 D. Subsequent Events

25 Mr. Hanley never repaid the \$100,000 Loan. Following the  
26 break-up of their relationship, the parties engaged in a lengthy

1 "sitzkrieg" of communications, primarily by e-mail. See, e.g., Exhibits  
2 20-23, 25-32. Of particular note, is a series of e-mails commencing with  
3 a suggestion by Mr. Hanley, in an e-mail dated December 13, 2011, that  
4 Ms. Murray write off the Note obligation as a bad debt for the 2011 tax  
5 year to set off against capital gains. See Exhibit 20. In a later e-  
6 mail, Mr. Hanley suggested how he could help make such a write-off work:  
7 "I CAN HELP YOU DO THIS. I WILL WRITE ANOTHER PROMISSORY NOTE DATED  
8 APRIL 8 OF THIS YEAR AND DUE DECEMBER 25TH OF THIS YEAR OR DECEMBER 1 OR  
9 WHEN EVER YOU WANT AND YOU CAN BALANCE IT AGAINST YOUR GAINS." See  
10 Exhibit 22, p. 2 (emphasis in original). Mr. Hanley and Ms. Murray both  
11 signed an amendment to the Note, setting a new due date for payment in  
12 full of December 28, 2011. See Exhibits 23, C and J, p. 6. The record  
13 reflects the parties' understanding that Ms. Murray in fact took the  
14 benefit of a bad debt deduction for nonpayment of the \$100,000 Loan  
15 obligation by Mr. Hanley for the 2011 tax year. See, e.g., Exhibit J.

16 In December 2011, Ms. Murray changed her name back to "Susan  
17 Leigh Murray." See Exhibit 21, p. 1. Thereafter, communications between  
18 the parties continued, including a valentine card from Ms. Murray to  
19 Mr. Hanley with the following statements: "Please know there will Never  
20 be any legal action taken against you to recover our money. You have it  
21 in writing." See Exhibit Q (emphasis in original). Mr. Hanley gave no  
22 consideration for that promise.

23 Ms. Murray never gave Mr. Hanley a cancellation and forgiveness  
24 of the \$100,000 Loan obligation, as he requested. See Exhibit 27, p. 2.  
25 On or about September 7, 2012, Ms. Murray sued Mr. Hanley in Idaho state  
26 court to collect the Note debt. See Exhibit B. Mr. Hanley filed for



1 relief under chapter 7 on November 29, 2012. The complaint in this  
2 Adversary Proceeding was timely filed on February 25, 2013.

3 Jurisdiction

4 I have jurisdiction to decide the claims at issue in this  
5 Adversary Proceeding under 28 U.S.C. §§ 1334 and 157(b)(2)(I).

6 Discussion

7 I will discuss each of the claims tried pursuant to the  
8 Pretrial Order in turn, starting with § 523(a)(6).

9 1. Section 523(a)(6)

10 Section 523(a)(6) excepts from discharge debts for willful and  
11 malicious injury to the person or property of another. The standards for  
12 willfulness and maliciousness under § 523(a)(6) are distinct. In  
13 particular, in order to find that damages were the result of willful  
14 action, I must find that a debtor acted with either a subjective intent  
15 to harm or a subjective belief that harm was substantially certain to  
16 result from the debtor's conduct. See Carrillo v. Su (In re Su), 290  
17 F.3d 1140, 1144-45 (9th Cir. 2002).

18 In this case, the evidence does not support a finding that  
19 Mr. Hanley intended to harm Ms. Murray when he borrowed the \$100,000 from  
20 her. He lost her money. However, at the time he entered into the  
21 \$100,000 Loan transaction, he did not have a subjective intent to lose  
22 the money and cause her harm, and in spite of his track record of losses  
23 in securities trading during the period preceding the \$100,000 Loan  
24 transaction, I do not find that Mr. Hanley subjectively believed that he  
25 was substantially certain to lose Ms. Murray's money when he borrowed it  
26 from her. At the close of the Trial, I advised the parties that I

1 intended to rule in favor of Mr. Hanley on the § 523(a)(6) claim, and I  
2 reiterate that ruling.

3 2. Section 523(a)(2)(A)

4 Section 523(a)(2)(A) excepts from a debtor's discharge debts  
5 for money obtained by "false pretenses, a false representation or actual  
6 fraud." The elements required to establish an exception to discharge  
7 claim under § 523(a)(2)(A) are:

- 8 (1) the debtor made a representation [to the  
creditor];
- 9 (2) at the time, debtor knew the representation was  
false;
- 10 (3) debtor made the representation with the intention  
and purpose of deceiving the creditor;
- 11 (4) the creditor justifiably relied on the  
representation;
- 12 (5) the creditor sustained damage as the proximate  
result of the representation's having been made.

13  
14 Mandalay Resort Group v. Miller (In re Miller), 310 B.R. 185, 194 (Bankr.  
15 C.D. Cal. 2004). See Turtle Rock Meadows Homeowners Ass'n v. Slyman (In  
16 re Slyman), 234 F.3d 1081, 1085 (9th Cir. 2000). The creditor plaintiff  
17 bears the burden of proof on each of those elements by a preponderance of  
18 the evidence. Grogan v. Garner, 498 U.S. 279 (1991); First Beverly Bank  
19 v. Adeeb (In re Adeeb), 787 F.2d 1339, 1342 (9th Cir. 1986). However,  
20 fraudulent intent can be established through the presentation of  
21 circumstantial evidence. See, e.g., In re Adeeb, 787 F.2d at 1343;  
22 Devers v. Bank of Sheridan, Mont. (In re Devers), 759 F.2d 751, 754 (9th  
23 Cir. 1985); and In re Johnson, 68 B.R. 193, 198 (Bankr. D. Or. 1986).

24 In this "she said, he said" case, the decision comes down to  
25 who I found more believable when I heard their testimony. Ultimately, in  
26 spite of minor inconsistencies in her testimony, I find that Ms. Murray

1 was more credible than Mr. Hanley about what happened when the \$100,000  
2 Loan transaction was discussed and implemented.

3 I find that Mr. Hanley initiated the request to obtain a  
4 \$100,000 loan from Ms. Murray. I find that Mr. Hanley knew that  
5 Ms. Murray was risk averse and induced her to make the loan by promising  
6 that he would invest the money conservatively to provide her with a 6%  
7 return. However, when he made the representation that he would invest  
8 Ms. Murray's funds conservatively, he fully intended to, and did, use the  
9 loan funds to continue his high-risk day trading. I find that Mr. Hanley  
10 knew that if he had told Ms. Murray that he was going to use the \$100,000  
11 Loan for day trading, she would not have loaned him the money. I find  
12 that Ms. Murray justifiably relied on Mr. Hanley's representation that he  
13 would invest the loan funds conservatively because of their personal  
14 relationship. He had given her some sound financial advice before, and  
15 she had no reason not to trust him. Finally, the \$100,000 Loan money was  
16 lost in a period of approximately three months or less because Mr. Hanley  
17 used it to fuel his day trading losses. I find that Ms. Murray suffered  
18 damages as a proximate result of her having loaned her money to Mr.  
19 Hanley based on his false representation as to how the money would be  
20 invested. I further find that the facts that the parties executed an  
21 amendment to the Note due date so that Ms. Murray could mitigate her loss  
22 and take a bad debt deduction for the 2011 tax year, at Mr. Hanley's  
23 suggestion, do not establish an "unclean hands" defense that would  
24 preclude Ms. Murray's § 523(a)(2)(A) claim. Accordingly, I find that  
25 Ms. Murray has met her burden of proof to establish each of the required  
26 § 523(a)(2)(A) elements, and I conclude that she is entitled to judgment

1 in her favor on her § 523(a)(2)(A) claim.

2 3. Section 523(a)(4) Embezzlement

3 Under federal law, embezzlement in the context of  
4 nondischargeability has often been defined as "the  
5 fraudulent appropriation of property by a person to  
6 whom such property has been entrusted or into whose  
7 hands it has lawfully come." Moore v. United States,  
8 160 U.S. 268, 269 (1885). Embezzlement, thus,  
9 requires three elements: "(1) property rightfully in  
the possession of a nonowner; (2) nonowner's  
appropriation of the property to a use other than  
which [it] was entrusted; and (3) circumstances  
indicating fraud." In re Hoffman, 70 B.R. 155, 162  
(Bankr. W.D. Ark. 1986); In re Schultz, 46 B.R. 880,  
889 (Bankr. D. Nev. 1985).

10 Transamerica Comm'l Finance Corp. v. Littleton (In re Littleton), 942  
11 F.2d 551, 555 (9th Cir. 1991).

12 At the outset, I note that this case does not present the  
13 typical embezzlement scenario of a bookkeeper or an accountant  
14 misappropriating employer funds, funds that he or she did not own, and  
15 attempting to conceal the misappropriation through false or misleading  
16 accounting entries. Mr. Hanley asked Ms. Murray for a \$100,000 loan, and  
17 she gave it to him. When the \$100,000 Loan funds were removed by  
18 Mr. Hanley from the parties' joint Wells Fargo account and transferred to  
19 Mr. Hanley's TD Ameritrade account, he owned them. Mr. Hanley was  
20 obligated to repay the \$100,000 Loan, with 6% interest, pursuant to the  
21 terms of the Note. He was not required to account to Ms. Murray for the  
22 disposition of the particular \$100,000 that she gave him, so long as she  
23 was repaid as agreed. I do not find that Mr. Hanley misappropriated  
24 funds in his possession as a nonowner. Accordingly, I conclude that  
25 Mr. Hanley is entitled to judgment in his favor on Ms. Murray's  
26 § 523(a)(4) embezzlement claim against him.

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cc: Tara J. Schleicher, Esq.  
Daniel T. Garner, Esq.

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